No. 15099

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, GUIDED MISSILE LODGE 1254, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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INDEX

AUTHORITIES CITED

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JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151 *et seq.*),[1] for enforcement of its order (R. 99–101, 103–104) [2] issued on March 22, 1955, against respondent union following the usual proceedings under Section 10 of the Act.[3]

[1] The pertinent provisions of the Act are appended hereto (pp. 19–22, *infra*).

[2] References to the printed record are designated "R". References preceding a semicolon are to the Board's findings; references following a semicolon are to the supporting evidence.

[3] The Board does not seek enforcement of the portion of its order (R. 97–99, 101–103), issued against Convair, a Division of General Dynamics Corporation, herein called the Company. The

This Court has jurisdiction of the proceeding, the unfair labor practices having occurred at Pomona, California, within this judicial circuit.[4]

The Board's Decision and Order are reported at 111 N. L. R. B. 1055.

STATEMENT OF THE CASE

I. The Board's findings and conclusions

Briefly, the Board found that the Union violated Section 8 (b) (2) and (1) (A) of the Act by maintaining an unlawful union-security agreement with the Company, and by causing the Company pursuant to this agreement to discriminatorily discharge the charging party, Charles E. Pense. The subsidiary facts upon which the Board based its findings are summarized below.

A. The unlawful union-security agreement between the Union and the Company

On December 16, 1952, the Union and the Company executed a contract which remained in effect until succeeded by a new agreement on February 1, 1954 (R. 31, 35; 144–145, 147–148). Article XIV of the 1952 contract, in part, read as follows (R. 35–36; 144–145):

> UNION SECURITY
>
> SECTION 1. Any employee within the bargaining unit who, on the effective date of this

Company has complied with the Board's order insofar as directed against it.

[4] The Company, a Delaware corporation, manufactures and sells military and commercial aircraft, missiles, and aircraft parts and accessories (R. 33; 7–8, 19–20). The interstate purchases and sales of its Pomona division run into millions of dollars (R. 34–35; 8, 21). No jurisdictional issue is presented.

agreement, is a member of the Union in good standing, and each employee within the bargaining unit who thereafter becomes a member of the Union shall pay while on the Company's active payroll and a member of the Union, initiation fees, monthly dues and general assessments levied by the International Association of Machinists, Guided Missile Lodge No. 1254, in accordance with the constitution and by-laws of the Union as a condition of employment while in the bargaining unit, provided that in no event shall the initiation fee, monthly dues or general assessment exceed the amount specified in the constitution and by-laws; and each employee who, after the effective date of this agreement, is separated from the bargaining unit and who at such time is subject to the provisions of this section shall, upon rehire within the bargaining unit, again pay regular dues to the Union commencing with the date of rehire; provided, further, that any employee may withdraw from membership in the Union by notifying the Union and the Company by registered mail, postmarked between August 1 to August 15 of the then currently effective yearly period.

SECTION 2. No employee, as a condition of employment while in the bargaining unit, shall be required to pay while on the Company's active payroll any Union membership dues, fees or general assessments covering any period during which the employee was not in the bargaining unit or was not on the Company's active payroll.

SECTION 3. Any employee subject to the provisions of Section 1 above, who is thereafter

> separated from the bargaining unit, shall upon his reemployment in a job within the bargaining unit again pay membership dues to the Union in accordance with Section 1 above, unless such employee has withdrawn from membership with the Union in accordance with this Article.

In practice, according to the Union (brief in support of exceptions, p. 8),[5] except in the case of employees permanently terminating their employment with the Company, "In all those situations * * * when, as, and if a person returned to the unit, he was obligated to resume the payment of dues."

B. The Board's conclusions concerning the contract

1. *The membership maintenance clause*

The Board and the Trial Examiner found that Article XIV of the 1952 contract between the Union and the Company was unlawful in that it required any union member separated from the bargaining unit to resume paying membership dues immediately upon reemployment within the bargaining unit, even though his union membership may have been discontinued in the meantime (R. 88–90, 41–46). Stating that such an employee, when reemployed, "stands in the same shoes as one being hired by the Respondent Company for the first time, who has never been a member of the Respondent Union," the Board, in agreement with the Trial Examiner, held that imposing "a contractual obligation upon an employee in that position to pay union dues beginning with the

[5] A copy of this brief has been lodged with the Clerk of the Court.

commencement of his employment'' was violative of the Act (R. 89, 44–45). Accordingly, the Board concluded that the Union, by maintaining in existence this unlawful provision, violated Section 8 (b) (1) (A) and (2) of the Act (R. 90).[6]

2. *The assessment provision*

Contrary to the Trial Examiner, the Board found that the Union further violated Section 8 (b) (1) (A) of the Act by maintaining in its contract with the Company the provision requiring the payment of general Union assessments, in addition to initiation fees and monthly Union dues, as a condition of employment (R. 90–91).[7] Since the Act does not authorize discharge for nonpayment of union assessments, the Board concluded that a contractual provision requiring such payments under penalty of discharge acts as restraint upon employees in the exercise of rights guaranteed in Section 7 of the Act (R. 91).

C. The discriminatory discharge of Pense

Charles Pense began work at the Company's Pomona division on January 19, 1953 (R. 46; 117).

[6] The provision in question was continued in the 1954 contract between the Union and the Company (R. 90; 147–148).

[7] The Trial Examiner found this provision to be void and illegal but concluded that it was not a basis for an unfair labor practice finding because he concluded that no coercion resulted from the mere inclusion of the provision in the contract. In his opinion, coercion could not occur until an assessment was levied (R. 37–41). The Board agreed with the Trial Examiner that the inclusion of the assessment provision in the contract did not violate Section 8 (b) (2) of the Act because the Union did not attempt to enforce this provision, which was dropped from its 1954 contract with the Company, and because the Union apparently did not intend to utilize it (R. 91–92).

Pense, a member of the Union from October 1952, was automatically dropped from membership for nonpayment of dues in December 1953 (R. 46; 117–118, 146). The Union thereafter, on December 8 and 17, 1953, and on January 15, 1954, notified the Company in writing that Pense had been dropped from membership for failure to pay dues and requested the Company "to immediately terminate" his employment "in accordance with the terms of our Agreement" (R. 48–49, 53; 120, 140–143). The Company complied with the Union's request and discharged Pense on January 15, 1954 (R. 53; 117).

D. The Board's conclusions concerning Pense's discharge

The Board found, contrary to the Trial Examiner, that the otherwise valid requirement that members pay dues as a condition of employment was not separable from the unlawful provisions in the contract and hence did not justify the Union in causing the Company to discharge Pense.[8] As the Board stated (R. 93–94): "All the provisions in question are related in character and are integral parts of the union-security arrangement devised by the respondents. Viewing the union-security section of the contract as a whole, we find that the lawful requirements therein[9] are so inter-

[8] The Trial Examiner found that the Union requested Pense's discharge for discriminatory reasons rather than for nonpayment of dues and hence that it violated the Act by causing his discharge (R. 54–61). In view of its holding that no valid union-security clause was available as a defense to Pense's discharge, the Board did not pass upon the validity of the Trial Examiner's pretext finding (R. 94).

[9] "The requirement for the payment of initiation fees and monthly dues is, of course, a valid one when considered in isolation." [Footnote renumbered.]

woven with the unlawful ones as to be tainted with illegality themselves." The Board concluded, accordingly, that the Union caused Pense's discharge in violation of Section 8 (b) (2) and (1) (A) of the Act (R. 94).

II. The Board's order

The Board ordered the Union to cease and desist from the unfair labor practices found and from in any other manner restraining or coercing employees in the exercise of their rights under Section 8 of the Act. Affirmatively, the Board ordered the Union, jointly and severally with the Company,[10] to make Pense whole for any loss in pay he may have suffered by reason of the discrimination against him; to notify the Company and Pense that it has no objection to his employment and that it would not in the future request the discharge of Pense or any other employee except for nonpayment of dues or initiation fees as permitted under an agreement authorized by Section 8 (a) (3) of the Act; and to post appropriate notices (R. 99–101, 103–104).

ARGUMENT

I. The Board properly found that the Union violated Section 8 (b) (2) and 8 (b) (1) (A) of the Act by maintaining an illegal union-security agreement with the Company

A. The maintenance of membership provision

The evidence summarized above establishes that the Union and the Company in 1952 entered into and thereafter gave effect to, a contractual provision which required, as a condition of employment, that all mem-

[10] As noted above (n. 3, p. 1), the Company has complied with the portion of the Board order directed against it.

bers should continue to pay union dues,[11] and that even if transferred out of the unit or leaving the Company's employ, such members, if transferred back or reemployed in the unit, should be liable for union dues from the date of their rehiring or return to the unit, regardless of whether they had resigned from or been dropped from the Union in the meantime. As noted above, the Board found that this provision, in effect a maintenance of membership requirement, exceeded the limits of union security permitted by the Act. This finding, as we shall demonstrate, was wholly proper.

Section 7 of the Act guarantees to employees the right, among others, to refrain from joining a union except to the extent that such right may be affected by an agreement requiring membership in a union as authorized in Section 8 (a) (3) of the Act. This right is protected from infringement both by employers and by labor organizations. Section 8 (a) (3) enjoins employers from discriminating against employees with respect to hire or terms or conditions of employment to encourage or discourage membership in any labor organization. Section 8 (b) (2) prohibits labor organizations from causing or attempting to cause employers to discriminate against employees in violation of Section 8 (a) (3). Section 8 (b) (1) (A) also forbids labor organizations from restraining or coercing employees in the exercise of the rights guaranteed in Section 7.

[11] With the exception of a 15-day escape period between August 1 and August 15.

The sole exception to the protection thus accorded to employees to refrain from becoming or remaining members of labor organizations is contained in the provisos to Section 8 (a) (3). The first proviso, which is the only one involved in this case, permits an employer to make an agreement with the bargaining representative of his employees which "requires as a condition of employment membership [in the union] on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later * * *." Maintenance of membership agreements, i. e., agreements requiring all present union members and all other employees thereafter voluntarily joining the union to maintain their union membership during the life of the contract, have long been recognized as a lesser form of union security which is permissible under the proviso to Section 8 (a) (3). See *Public Service Company of Colorado,* 89 N. L. R. B. 418, 419–423; *Charles A. Krause Milling Co.,* 97 N. L. R. B. 536, 542, n. 18; *Utility Co-Workers Association,* 108 N. L. R. B. 849; *Communications Workers of America, CIO* v. *N. L. R.,* 215 F. 2d 835, 836.

Under the maintenance of membership agreement executed by the Union, however, it was stipulated that "each employee who, after the effective date of this agreement, is separated from the bargaining unit and who at such time is subject to the provisions of this section shall, *upon rehire within the bargaining unit, again pay regular dues to the Union* commencing with the date of rehire." [Emphasis supplied.]

This requirement, that employees pay dues immediately upon reemployment even though they may have relinquished, or been dropped from, union membership while out of the unit and therefore outside the coverage of the agreement, went beyond the permissive language of the first proviso to Section 8 (a) (3). It required the payment of union dues by employees whose union membership had been validly terminated while out of the unit, or out of the Company's employ, and who therefore were under no obligation to resume paying union dues. Even if the clause in question were to be construed as requiring all union members covered by it to rejoin the Union upon returning to the unit, i. e., assuming that the parties intended it to be a strict union security clause insofar as they were concerned, the clause nevertheless exceeds permissible bounds in that it fails to allow the former members thirty days in which to rejoin, as required by the first proviso to Section 8 (a) (3).

Before the Board the Union argued, first, that the provision in question was never intended to apply to employees permanently quitting the Company's employ and that it should not be regarded as requiring employees who completely severed their employment relationship with the Company immediately to start paying dues upon being rehired in the unit. Secondly, the Union urged that as to other employees who left the unit for one reason or another, such as a leave of absence, a lay-off, or a transfer to work outside the unit, their rights and obligations of membership were merely temporarily suspended during their

separation from the bargaining unit, and that such employees, if they had not resigned their union membership during the August 1–August 15 period provided in the agreement, could validly be required to resume payment of dues from the date of their return to the unit.

In making the first argument the Union tacitly recognizes that if the agreement has the scope found by the Board, i. e., requires persons leaving the Company's employ to start paying dues immediately upon being rehired by the Company, it is not sanctioned by the Act. That the agreement has such scope is apparent from the language of the agreement itself. Thus, it specifically provides that "each employee who * * * shall, upon rehire within the bargaining unit, again pay regular dues to the Union commencing with the date of rehire." This language is unambiguous, and covers employees permanently quitting the Company's employ as well as employees temporarily separated from the unit for other reasons. The agreement, therefore, is not open to the interpretation urged by the Union, and it cannot be defended on this ground. And even if the agreement were not so clear on its face, since the Union is seeking to justify it under an exception to the general prohibition of the Act against employer discrimination, any doubt must be resolved against the Union. As is well recognized, "one seeking to come within the exception must clearly comply with its terms." *N. L. R. B.* v. *Don Juan, Inc.,* 178 F. 2d 625, 627 (C. A. 2); *N. L. R. B.* v. *Radio Officers Union,* 196 F. 2d 960,

964 (C. A. 2), affirmed, 347 U. S. 17; cf. *N. L. R. B.* v. *Mason Mfg. Co.*, 126 F. 2d 810, 813 (C. A. 9).

The Union's further argument that it could validly require all employees except those permanently severing their employment relationship with the Company to resume payment of dues immediately upon resuming active status in the unit, assumes that such employees, for example, one who had transferred to another plant, somehow became disabled from terminating their membership in the Union through normal union procedures. There is no basis for this assumption. These employees, no less than employees permanently severing their connection with the Company, were entitled, once they were no longer in the unit covered by the contract, to resign or be dropped from the Union.

The Union in effect contends that the rights and obligations of these employees were merely temporarily suspended by the separation from the unit, and that if they had not resigned from the Union during the August 1–August 15 period provided in the contract, they could be required to pay dues from the day of their return to the unit. This contention wholly overlooks the fact that the statutory representative of employees can bind his constituent employees only so long as they remain his constituent employees. Hence, the Union could not, consistently with the policies of the Act, bind the employees here in question to retain their union membership at a time when they were not covered by the contract. As pointed out by the Board and the Trial Examiner (R. 89, 44), an employee, once out of the unit, is not

covered by the contract and may drop his Union membership without regard to the restrictions in the contract. An employee who has done so, in the words of the Board, "stands in the same shoes as one being hired by the Respondent Company for the first time, who has never been a member of the Respondent Union" (R. 89). It is undisputed that the 1952 contract could not be validly applied to require such an employee to pay union dues from the start of his employment.

B. The payment of assessments provision

Section 8 (b) (2) specifically provides that it shall be an unfair labor practice for a labor organization to cause or attempt to cause an employer "to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." As the Supreme Court has stated, "the policy of the Act is to insulate employees' jobs from their organizational rights" and "to prevent utilization of union-security agreements except to compel payment of dues and initiation fees". *Radio Officers' Union* v. *N. L. R. B.*, 347 U. S. 17, 40–41.

As shown above, the union-security provision here involved expressly required Union members to pay "general assessments levied by the [Union] * * * as a condition of employment while in the bargaining unit." This requirement that members pay, as a condition of employment, general assessments, in addition to initiation fees and monthly union dues, went

beyond the permissive limits of Sections 8 (a) (3) and 8 (b) (2). The Board has repeatedly held that assessments are not "periodic dues" within the meaning of Section 8 (b) (2) and Section 8 (a) (3). *International Harvester Co.,* 95 N. L. R. B. 730; *Lever Bros.,* 97 N. L. R. B. 1240; *Continental Can Co.,* 98 N. L. R. B. 1252; *National Malleable and Steel Castings Co.,* 99 N. L. R. B. 737; *John Deere Planter Works of Deere and Co.,* 107 N. L. R. B. 1497. That it was a purpose of Congress in limiting the scope of permissible union-security agreements to free the right of employment from the payment of union assessments is clear from the legislative history of the 1947 Amendments. See *International Harvester Co.,* 95 N. L. R. B. at 732–833.

The Union's conduct in continuing in effect this illegal requirement, even apart from any attempt at actual enforcement of the unlawful provisions, constituted a violation of Section 8 (b) (1) (A). As the Court of Appeals for the Second Circuit stated in a similar situation (*N. L. R. B.* v. *Red Star Express,* 196 F. 2d 78, 81):

> The execution of a contract containing a forbidden union-security clause constitutes an unfair labor practice [prohibited by Section 8 (b) (2) and 8 (b) (1) (A)]. This is so because the existence of such an agreement without more tends to encourage membership in a labor organization. The individual employee is forced to risk discharge if he defies the contract by refusing to become a member of the Union. It is no answer to say that the Act gives him a remedy in the event that he is discharged.

> The Act requires that the employee shall have freedom of choice, and any form of interference with that choice is forbidden.

See also *N. L. R. B.* v. *Waterfront Employers of Washington,* 211 F. 2d 946, 951 (C. A. 9); *N. L. R. B.* v. *F. H. McGraw and Co.,* 206 F. 2d 635, 641 (C. A. 6). Cf. *N. L. R. B.* v. *Gottfried Baking Co.,* 210 F. 2d 772, 779–780 (C. A. 2).

In its brief to the Trial Examiner, the Union urged that the mere inclusion in the agreement of the provision for the payment of assessments as a condition of employment was not by itself a violation of the Act, that there had to be some implementation of the provision, by the levying of an assessment, for example, before restraint or coercion of employees could occur. The Union asserts that no such collection of assessments was ever made under the agreement. However, this argument ignores the rights of employees under Section 7 of the Act to be free from potential as well as immediate restraints upon the exercise of the right to refrain from union activities. As shown above, a union-security provision requiring union membership contrary to the terms of the proviso to Section 8 (a) (3) is violative of Section 8 (b) (1) (A), even if not enforced, because the threat inherent in its mere existence may be carried out at any time and coerce an employee to join the union rather than to risk discharge. An assessment provision poses a similar threat and in the same way may coerce an employee into paying the assessment rather than to risk discharge. For these reasons the

Board properly rejected the Trial Examiner's finding to the contrary.

II. The Board properly found that the Union violated Section 8 (b) (2) and 8 (b) (1) (A) by causing Pense's discharge under an illegal union-security agreement

As stated above, Pense was dropped from membership in the Union in December 1953 for non-payment of dues. The Union thereafter on three occasions formally requested that Pense be terminated for non-payment of dues in accordance with the union-security provisions of the agreement. On January 15, 1954, the Company discharged Pense in compliance with these requests. As shown in Point I above, the agreement pursuant to which Pense was discharged exceeded the limits of permissible union security both with respect to the maintenance of membership provision and also with regard to the assessment provision. The agreement, being invalid, affords no defense to discrimination based on union membership or the lack of it. Hence by invoking the agreement against Pense and causing the Company to discharge him for failing to pay dues, the Union further violated Section 8 (b) (2) and 8 (b) (1) (A). *N. L. R. B.* v. *United Hoisting Co. et al.,* 198 F. 2d 465 (C. A. 3); *Red Star* case, *supra.*

The Union argued that the provision in the 1952 agreement for the payment of initiation fees and monthly dues was severable from the unlawful maintenance of membership and assessment provisions, and hence that it was properly invoked against Pense. However, examination of the union-security provision shows that the unlawful assessment provision is in-

cluded in the same phrase as the provision for the payment of fees and dues and is given precisely the same emphasis. Thus, any employee who decides to join the Union must thereafter maintain membership in good standing by paying "initiation fees, monthly dues and general assessments levied by the [Union]." This requirement is immediately followed by the illegal maintenance-of-membership provision which deprives former members of their statutory right, upon reemployment, to refrain from rejoining the Union. The Union did not regard the illegal dues provision as of minor significance. In practice it did not differentiate between the lawful and unlawful provisions in the contract concerning the payment of dues. By its own admission, all former Union members except those who had completely severed their employment with the Company were required to pay dues from the beginning of their reemployment. Before the Board the Union vigorously defended its right to impose such a requirement, asserting that the Trial Examiner's finding of illegality, if adopted, would "destroy the effectiveness of all Maintenance of Membership clauses" (Brief in support of exceptions, p. 7).[12] Significantly, the illegal dues provision was carried over to the 1954 contract executed by the Union and the Company (*supra,* n. 6, p. 5).

The foregoing, we submit, fully supports the Board's finding, contrary to the Trial Examiner, that (R. 93):

> All the provisions in question are related in character and are integral parts of the union-

[12] As noted above, a copy of this brief has been lodged with the Clerk of the Court.

> security arrangements devised by the respondents. Viewing the union-security section of the contract as a whole, we find that the lawful requirements therein are so interwoven with the unlawful ones as to be tainted with illegality themselves. For this reason, we find that no valid security clause is available as a defense to the discharge of Pense [footnotes omitted].

See *N. L. R. B.* v. *Rockaway News Supply Company,* 345 U. S. 71, where the Supreme Court, in holding that an invalid union-security clause did not necessarily invalidate an entire contract, stated that "a forbidden provision [may be] so basic to the whole scheme of a contract and so interwoven with all its terms that it must stand or fall as an entirety" (345 U. S. at 78).

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the order in full.

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JULY 1956.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151 *et seq.*), are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to

require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made: * * * *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the

initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order

was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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